

OCT 10 1986
ORIGINAL

Before The Copyright Royalty Tribunal
Washington, D.C. 20036

In the Matter of)
)
1984 Cable Royalty) CRT DOCKET NO: 85-4-84CD
Distribution Proceeding)

MOTION TO STRIKE AND TO AMEND CLAIM

Multimedia Entertainment, Inc. (Multimedia) by its attorneys, hereby submits this Motion to Strike certain portions of the direct case of MPAA submitted September 29, 1986. This Motion is based upon the failure of MPAA to respond affirmatively to certain requests for documents and discovery. The position of MPAA regarding these requests was provided in a telephone conversation of October 9, 1986. Based upon the inability of the MPAA to respond fully to Multimedia's discovery request prior to October 9, 1986, the Tribunal granted Multimedia an extension of time until October 10, 1986 to submit this Motion.

1. Discovery Request No. 7 reads as follows:

With reference to the chart on page 3 of Cooper's testimony, (a) identify those owners who are not Phase II claimants and the programs which comprise the 63.2 million viewing hours, (b) provide source information regarding "unidentified programs/owners."

The request for identification of owners and programs and source material relating thereto was rejected by MPAA's counsel as "not relevant" to its claim. To the contrary, however, MPAA makes specific representations on Page 3 of Allen Cooper's testimony regarding unclaimed funds. Furthermore, MPAA has chosen to include all of the sums attributable to these programs to its own claim, boosting that total from 96.34% to 99.37%. Without access to the information in Discovery Request No. 7, Multimedia has no opportunity to cross-examine effectively regarding the accuracy of such information. Therefore, Multimedia asks that the Tribunal strike from the MPAA direct case (1) the column references to "Owners, Not Phase 2 Claimants" and "Unidentified Programs/Owners" in the chart on Page 3, (2) the right-hand column of the chart, and (3) the three sentences in the paragraph immediately following the chart on Page 3. Furthermore, MPAA's total claim should be amended to read 96.34%.

2. Discovery Request No. 8 reads as follows:

With respect to Exhibit 4,
provide the source material
used to create the Exhibit,
including, but not limited to,
any reports, summaries,
analyses and prior compilations
prepared by Nielsen, Cable Data
Corp. or MPAA staff.

Counsel for MPAA claims, inconsistently in Multimedia's view, that no such source material exists, and that any material which may exist is protected from disclosure by attorney client privilege. In the 1983 proceeding, in response to discovery requests in Phase I and Phase II, MPAA made available the very same source material that Multimedia now seeks. To the extent that Exhibit 4 is derived from certain reports which MPAA staff used in developing the exhibit, these documents are essential to effective cross-examination on Exhibit 4. The actual existence of such documents is suggested not only by counsel's claim of privilege but also by Marsha Kessler's testimony which references a listing of properties totaling approximately 6500. See Kessler Testimony at 5. This number contrasts with the total of 5,874 appearing in Exhibit 4. Furthermore, as the process of review and verification is explained by Ms. Kessler, it is likely that the other documents requested by Multimedia do indeed exist and they are not counsel's work product. While Multimedia is not seeking notes which are appropriately embraced within the attorney client privilege, it does seek that source material which MPAA was provided by Nielsen or Cable Data Corp., or which its staff used in developing Exhibit 4.

In light of MPAA's refusal to make such material available, Multimedia moves that the Exhibit 4 and all references to it in the Direct Case of MPAA be stricken.

3. Discovery Request No. 14 reads as follows:

Provide (a) the listing of 6500 properties identified at page 5 of Kessler's testimony; (b) a listing of programs [that] are not included in the final 5,874 identified in Exhibit 4; and (c) an alphabetical listing of Exhibit 4.

While MPAA said it would release the alphabetical listing, the other requests were denied as "not relevant" because MPAA does not make a claim for those programs.

Multimedia strenuously rejects the suggestion that such data is not relevant. These listings are similar to documents released in the 1983 case and discussed in cross-examination during that proceeding. In the 1983 case, MPAA stated that it took an original listing of programs, combined certain titles and deleted others, to produce its claim. The identical process was undertaken in reducing the 6,500 program listing to the 5,874 appearing in Exhibit 4. However, absent release of the underlying data, Multimedia is not in a position to assess whether any errors taint the results in Exhibit 4.

Moreover, programs claimed by Multimedia (and other Phase II parties such as NAB) must be identified in the listings specified in Discovery Request No. 14. If they are

not, there exists no foundation whatsoever for MPAA Exhibits 5 and 6. The adequate cross-examination of these exhibits cannot be conducted without the discovery material. Finally, MPAA's claim of 99.37% is based on this data. See Cooper testimony at 3. Thus, these listings are highly relevant to MPAA's case, to key Exhibits and to responsible cross-examination.

In light of MPAA's failure to disclose this material, Multimedia moves that Exhibits 5 and 6 should be stricken, together with the following text from Cooper's testimony: (1) the line entry in the chart on page 3 referring to Multimedia, (2) the last sentence on page 4, (3) the last paragraph on page 5 through the first full paragraph on page 8.

Respectfully submitted,

MULTIMEDIA ENTERTAINMENT, INC.

By


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October 10, 1986

CERTIFICATE OF SERVICE

I, Cathy J. Stiltner, do hereby certify that I have this 10th day of October 1986, mailed by First Class, United States mail, postage prepaid, the foregoing MOTION TO STRIKE AND TO AMEND CLAIM to the following:

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